Filed 8/6/15 Bunting v. Ostoposides

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DONALD BUNTING et al., Plaintiffs and Respondents, v. SOCRATES OSTOPOSIDES et al., Defendants and Appellants.	B241550 (Los Angeles County Super. Ct. No. YC057372)

APPEAL from a judgment of the Superior Court of Los Angeles County, Cary H. Nishimoto, Judge. Affirmed.

Socrates Ostoposides, in pro. per., and Renna Ostoposides, in pro. per., for Defendants and Appellants.

Robinson Di Lando and Mark Kane for Plaintiffs and Respondents.

* * * * * *

In this dogbite case, defendant siblings Socrates and Renna Ostoposides appeal a default judgment entered in favor of plaintiffs Donald and Diana Bunting for $60,517 plus costs, and a postjudgment motion to vacate the judgment denied by the trial court.[1] We affirm.

BACKGROUND

Plaintiffs filed the operative first amended complaint (FAC) on May 27, 2008, alleging various negligence and related causes of action against defendants following a dog attack. In brief, plaintiffs alleged two dogs belonging to defendants escaped defendants' property and attacked them and their dog while they were walking on a city street, causing injuries to all three of them.

On July 21, 2008, plaintiffs filed proofs of service of the summons, the FAC, a statement of damages, and alternative dispute resolution documents on all three defendants. The process server personally served Socrates at his home on June 28, 2008, at 4:45 p.m. and substitute served Renna and Olga by leaving copies with Socrates and by mailing the documents to Olga and Renna at the same address after the process server attempted on three consecutive days to personally serve them. The process server signed all the proofs of service under penalty of perjury and submitted affidavits of reasonable diligence outlining his attempts to personally serve Olga and Renna.

Defendants did not file responsive pleadings by July 31, 2008, so plaintiffs applied for default. It was rejected as "premature" for Olga and Renna, but apparently accepted as to Socrates. On August 8, 2008, proceeding without an attorney, Renna filed form CM-020 entitled "Ex Parte Application for Extension of Time to Serve Pleading and Order Extending Time to Serve," purporting to request an extension of time for all three

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[1] Socrates and Renna's mother, defendant Olga Ostoposides, was also subject to default judgment. She appealed the judgment and the postjudgment motion along with Renna and Socrates, but this court stayed all appellate proceedings as to her after she filed for bankruptcy. Her appeal remains stayed. We will refer to the three Ostoposides defendants collectively as defendants and Socrates and Renna as appellants, and we will use their first names to refer to them individually for convenience only.

defendants to respond to the FAC because they first became aware of the action when they received a request for entry of default on August 4, 2008. The form indicated, "Note: This ex parte application will be considered without a personal appearance. (See Cal. Rules of Court, rule 3.1207(2).)" Only Renna signed the form. On August 8, 2008, the trial court denied the ex parte request without prejudice as to Socrates and Olga "as those defendants are not present or represented in court today." The court granted the request as to Renna, giving her until August 13, 2008, to file a responsive pleading.

On August 13, 2008, Renna filed another form CM-020 ex parte request for an extension of time, again purportedly on behalf of herself, Socrates, and Olga, but again only signed by her. The court granted the request as to Renna only and extended her deadline to September 13, 2008. It entered default against Olga and Socrates.

On September 15, 2008, all three defendants filed a "Motion to Quash Summons and Complaint," claiming they were never served with the summons and FAC. Plaintiffs opposed, attaching the proofs of service and a declaration from the process server. On October 24, 2008, the court denied the motion as to Renna and ordered her to file a responsive pleading within 14 days. It denied the motion as to Olga and Socrates because default was entered against them on August 13, 2008.

Defendants filed another ex parte request for extension of time on November 12, 2008, signed by all of them this time and arguing plaintiffs did not serve Olga and Socrates with a statement of damages. Only Renna appeared at the hearing and the court denied the request as to her. It did not expressly rule on the request as to Socrates or Olga. Renna filed an answer on November 21, 2008.

Several months later on February 13, 2009, Socrates and Olga moved to set aside the defaults against them as void, arguing they were never served with a statement of damages and they mistakenly believed Renna could appear on their behalf to request an extension of time, given the form CM-020 indicated they would not have to make a personal appearance. Notwithstanding their position they had never been served, they submitted the proofs of service and affidavits of reasonable diligence reflecting service of the summons, FAC, and statement of damages. In opposition, plaintiffs also submitted

the proofs of service, as well as the statement of damages they had served on defendants, which listed special damages of $11,641.12 and general damages of $500,000, plus costs. They argued defendants' motion was merely a delay tactic and the trial court's research attorney told Renna at the November 12, 2008 hearing that she could not represent Socrates and Olga. In reply, Socrates and Olga argued that not only was a statement of damages never served, but the statement of damages submitted by plaintiffs was not on the "mandatory form adopted by the [J]udicial [C]ouncil," form CIV-050.

The court held a hearing on the motion on March 23, 2009. Socrates did not appear, but Olga appeared with assistance from Renna as an interpreter. The court took the matter under submission and denied the motion on April 15, 2009, because Socrates and Olga were properly served and failed to produce competent admissible evidence to overcome the presumption of valid service, citing Evidence Code section 647.[2]

A significant delay in the case against Renna ensued. In short, Renna filed several notices of appeal and sought stays in the trial court, the last of which was granted, staying the case from May 14, 2009, until her appeal was dismissed and the remittur issued on June 22, 2010. Renna also failed to respond to discovery, leading the trial court to eventually impose terminating and monetary sanctions, strike her answer to the FAC, and enter default against her.

Finally, on December 7, 2011—three and a half years after plaintiffs filed the FAC—the court entered default judgment against all three defendants in the amount of $60,019 plus $498 in costs.

More than three months later on March 27, 2012, defendants filed a "Motion to Vacate and Void Judgment" pursuant to Code of Civil Procedure 473, subdivision (d), arguing that plaintiffs provided false statements about the dog attack and the extent of Donald Bunting's injuries. Plaintiffs opposed, arguing defendants were barred from contesting liability and damages, and their contentions would show at most intrinsic fraud

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[2] The trial court erroneously cited *Code of Civil Procedure* section 647.

insufficient to set aside the default judgment. They also filed evidentiary objections. Defendants filed a reply and filed objections to plaintiffs' objections.

The trial court denied the motion on April 24, 2012, as follows:[3] "Defendants Socrates Ostoposides' and Olga Ost[o]posides' Motions to Set Aside their Defaults were already heard and denied on 4.15.09. Defendants fail to establish that the judgment is void on its face. CCP 473(d). Defendants fail to show entitlement to relief based on the equitable power of the court. Defendants fail to provide any facts to establish that the judgment was obtained through fraud. Defendants were not deprived of a fair adversary hearing. Instead, defendants Socrates Ostoposides' and Olga Ostoposides' defaults were entered after they were properly served with the summons and complaint and they failed to file a timely response. Defendant Renna Ostoposides' default was entered after plaintiffs' motion for terminating sanctions was granted and defendants' Answer was stricken following defendants' willful refusal to comply with her discovery obligations."

Defendants filed a notice of appeal on May 23, 2012, identifying the default judgment entered December 7, 2011, and the April 24, 2012 order denying the motion to vacate the default judgment.

DISCUSSION[4]

1. Denial of February 2009 Motion to Vacate Default

Socrates argues the trial court abused its discretion by denying his February 2009 motion to vacate default for four reasons: (1) the court should have granted the August and November ex parte requests for extensions of time for him to respond to the FAC; (2) plaintiffs did not serve a statement of damages before default was entered; (3) if they did serve a statement of damages, it was not filed prior to the entry of default and it was not

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[3] The court did not rule on the evidentiary objections.

[4] Appellants' opening brief, filed without an attorney, does not include citations to the record for many points. (Cal. Rules of Court, rule 8.204(a)(1)(C).) Although they are unrepresented, they must follow the rules just as represented parties. (*Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276, 1284 (*Gamet*).) But with the exception of one argument discussed *post*, their brief is not so deficient that we cannot rule on the merits.

on the proper form; and (4) the trial court erred in refusing to issue an order removing him from penal custody so he could appear at the hearing on his motion.

"The ruling on a motion to vacate will only be disturbed on appeal where there is a clear showing of abuse of discretion and a manifest miscarriage of justice. [Citation.] The test for abuse of discretion is 'whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.'" (*Gamet, supra,* 91 Cal.App.4th at p. 1283.)

A. Denial of Requests for Extension of Time

Although not precisely delineated as such in his brief on appeal, Socrates appears to argue (as he did in the trial court) that the trial court erred in denying his motion to vacate default pursuant to Code of Civil Procedure section 473, subdivision (b)[5] because he mistakenly believed he did not need to appear in order to obtain an extension of time to respond to the FAC. He cites the following notation on form CM-050: "Note: This ex parte application will be considered without a personal appearance. (See Cal. Rules of Court, rule 3.1207(2).)"[6] He is correct the trial court should not have required him to personally appear to obtain an extension. Rule 3.1207(2) of the California Rules of Court provides, "An applicant for an ex parte order must appear, either in person or by telephone under 3.570, except in the following cases: [¶] . . . [¶] (2) Applications for extensions of time to serve pleadings . . . ." The problem was that Socrates was not "[a]n applicant" under the rule because he did not personally sign the request. Renna signed it

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5 Code of Civil Procedure section 473, subdivision (b) states in relevant part, "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." We reject plaintiffs' contention that Socrates waived his argument under this provision by inadequately addressing it in the trial court or on appeal.

6 In denying Socrates's motion, the trial court did not expressly address this argument, but we presume the court rejected it. (*Blankenship v. Allstate Ins. Co.* (2010) 186 Cal.App.4th 87, 104-105.)

on his behalf, and as a nonattorney she was unable to appear for him. (*Drake v. Superior Court* (1994) 21 Cal.App.4th 1826, 1830.) For that reason, the trial court properly rejected the request as to Socrates, even if it cited the wrong reason in its minute order.

We are concerned, however, that the trial court's minute order confused and potentially misled appellants, particularly given they repeated their mistake a few days later when Renna filed an identical ex parte request on behalf of all defendants but only signed it herself. By the time Socrates fixed the problem by personally signing the November 12, 2008 ex parte request, default had already been entered. As we have noted, unrepresented litigants are subject to the same rules as represented parties, but that does not mean the trial court should set them adrift when it becomes clear they do not know what is expected of them. (See *Gamet, supra*, 91 Cal.App.4th at p. 1284 ["Trial judges must acknowledge that in propria persona litigants often do not have an attorney's level of knowledge about the legal system and are more prone to misunderstanding the court's requirements. . . . The judge should monitor to ensure the in propria persona litigant is not inadvertently misled, either by the represented party or by the court. While attorneys and judges commonly speak (and often write) in legal shorthand, when an in propria persona litigant is involved, special care should be used to make sure that verbal instructions given in court and written notices are clear and understandable by a layperson."].)

Nevertheless, we will not reverse the judgment because we can identify no possible prejudice from the trial court's failure to grant Socrates an extension of time to respond to the FAC. (*Diaz v. Carcamo* (2011) 51 Cal.4th 1148, 1161 [prejudice requires "'a reasonable probability that in the absence of the error, a result more favorable to [appellant] would have been reached'"].) First, the ex parte requests as to Socrates were untimely. Socrates was personally served with the summons and FAC on June 28, 2008, so he had 30 days to file a responsive pleading, i.e., July 28, 2008. (Code Civ. Proc., § 412.20, subd. (a)(3).) That deadline had expired by the time Renna filed the first ex parte request on his behalf on August 8, 2008. Second, Socrates could have avoided default by simply complying with the court's order and personally appearing at the

August 13, 2008 hearing, or at the very least personally signing the August 13, 2008 ex parte request. Even though the court did not specifically inform him he had to do so, he could not have reasonably believed the court would grant an identical request once again signed only by Renna. Finally, Socrates has never once hinted in the years-long proceedings in this case—including on appeal—that he intended to answer the FAC or otherwise defend the lawsuit on the merits. Indeed, even now he asks us to remand this case with instructions to vacate the default judgment and *dismiss the case with prejudice*, rather than remand so he may respond to the FAC. Thus, reversal is not warranted.

B. Service of Statement of Damages

Socrates argues his default should have been set aside pursuant to Code of Civil Procedure section 473, subdivision (d) because he was never served with a statement of damages. "The court may, upon motion of the injured party, or its own motion, . . . set aside any void judgment or order." (Code Civ. Proc., § 473, subd. (d).) In a personal injury action, Code of Civil Procedure section 425.11 requires a statement of damages to be served in the same manner as a summons before default may be taken. (Code Civ. Proc., § 425.11, subds. (b)-(d).) If it is not served, any default is void. (*Anastos v. Lee* (2004) 118 Cal.App.4th 1314, 1318 (*Anastos*).) Service of a summons may be effected by personal service (Code Civ. Proc., § 415.10), or, if the party cannot be personally served after the exercise of reasonable diligence, by substitute service by leaving a copy at the party's home with a member of the household over the age of 18 and mailing a copy to the party (Code Civ. Proc., § 415.20, subd. (b)). The filing of a statutorily compliant proof of service by a registered process server creates a rebuttable presumption of proper service. (Evid. Code, § 647; *Dill v. Berquist Construction Co.* (1994) 24 Cal.App.4th 1426, 1441-1442.)

Plaintiffs filed statutorily compliant proofs of service along with supporting declarations demonstrating Socrates had been personally served with the summons, FAC, and statement of damages on June 28, 2008, which created a presumption of proper service. To rebut plaintiffs' showing, Socrates submitted conclusory declarations from himself, Olga, and Renna indicating none of them was served with the summons, FAC, or

a statement of damages. The trial court implicitly found their statements not credible when it ruled Socrates failed to produce competent admissible evidence to overcome the presumption of valid service under Evidence Code section 647.

On appeal, we review this factual finding to determine "'"'"whether there is any substantial evidence, contradicted or uncontradicted,'"'" to support it. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.) We view the evidence "'"'"in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor."'"' (*Ibid.*) Further, because the trial court's ruling was a credibility finding, we must defer to the court's decision to reject defendants' declarations and credit plaintiffs' evidence, which was not "'inherently improbable or incredible, i.e., "'unbelievable *per se*,'" physically impossible or "'wholly unacceptable to reasonable minds.'"'" (*Ibid.*) Plaintiffs' evidence was more than sufficient to support the trial court's decision, so the court did not abuse its discretion in denying Socrates's motion to vacate default for lack of service of a statement of damages.[7]

C. Filing of Statement of Damages on Mandatory Form

Socrates argues default was invalid because plaintiffs did not *file* the statement of damages before obtaining default against him. However, plaintiffs needed only to *serve* the statement of damages before obtaining default, which they did. (*Scognamillo v. Herrick* (2003) 106 Cal.App.4th 1139, 1147.)

Socrates also argues the statement of damages was invalid because it was not on form CIV-050. Plaintiffs concede form CIV-050 is mandatory and they did not use it. (*Fasuyi v. Permatex, Inc.* (2008) 167 Cal.App.4th 681, 688; see Judicial Council Forms, form CIV-050 ["Statement of Damages (Personal Injury or Wrongful Death)"].) But "[w]here a reasonable attempt has been made to comply with a statute in good faith, and

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[7] We find Socrates's citation of *Plotitsa v. Superior Court* (1983) 140 Cal.App.3d 755, 759 (*Plotitsa*) inapt because the plaintiff in that case did not serve a statement of damages on the defendants, whereas here there was substantial evidence supporting the trial court's finding that plaintiffs personally served Socrates with the statement of damages.

there was no attempt to mislead or conceal, the doctrine of substantial compliance holds that the statute may be deemed satisfied." (*Davis v. Allstate Ins. Co.* (1989) 217 Cal.App.3d 1229, 1232; cf. Cal. Rules of Court, rule 1.5(a) ["The rules and standards of the California Rules of Court must be liberally construed to ensure the just and speedy determination of the proceedings that they govern."].) Code of Civil Procedure section 425.11, subdivision (b) requires the statement of damages to set forth "the nature and amount of damages being sought." Courts have interpreted this provision to require general and special damages to be listed separately. (*Plotitsa, supra*, 140 Cal.App.3d at pp. 761-762.) This provision "protect[s] a defaulting defendant from unlimited liability by providing notice of the maximum judgment that may be assessed." (*Anastos, supra*, 118 Cal.App.4th at p. 1318.) Here, plaintiffs' statement of damages satisfied the statute and gave defendants adequate notice by listing special damages of $11,641.12 for medical expenses, lost earnings, and veterinary bills, and $500,000 in general damages. Notably, the default judgment was for far less—$60,517, including costs—and Socrates has not suggested he was prejudiced in any way from plaintiffs' failure to use the mandatory form. (Cf. *Davis, supra*, at p. 1234 [finding no prejudice from mistakenly serving similar previous version of complaint].) Thus, reversal is not warranted.

D. Removal Order

Finally, Socrates argues the trial court erred in not granting an order to remove him from penal custody to appear at the March 23, 2009 hearing on his motion to vacate default because he was an indigent prisoner. Other than citing what appears to be a proposed order and relaying without a record citation a conversation Renna purported to have had with the trial court clerk on this issue, Socrates offered no evidence to support his claim he was incarcerated and indigent at the time. In the absence of supporting record citations, we find this argument forfeited. (*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246-1247.)

2. Attack on the Merits

Although not delineated under a separate argument heading, appellants include a lengthy discussion of their belief that plaintiffs provided false statements about the dog

attack and the extent of Donald Bunting's injuries. However, Renna does not challenge the terminating sanctions or default judgment entered against her, and as we have discussed, the default judgment against Socrates was valid, so appellants are barred from challenging the merits of liability or damages at this stage. (*Steven M. Garber & Associates v. Eskandarian* (2007) 150 Cal.App.4th 813, 823-824.)

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.